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**In the  
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

ATLANTIC TUBING & RUBBER COMPANY,  
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,  
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Brief for Respondent in Opposition.**

RALPH J. GONNELLA,  
HODOSH, SPINELLA, HODOSH & ANGELONE,  
808 Union Trust Building,  
Providence, Rhode Island 02903.

Of Counsel:

THOMAS C. ANGELONE,  
HODOSH, SPINELLA, HODOSH & ANGELONE,  
808 Union Trust Building,  
Providence, Rhode Island 02903.

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## Question Presented.

Whether plaintiff was deprived of its Seventh Amendment right to trial by jury as a result of the procedure followed by the district court in submitting special questions to the jury pursuant to Rule 49(a), F.R.C.P.

### Statement of the Case.

This action was commenced on March 16, 1973, by the plaintiff, Atlantic Tubing and Rubber Co., a Rhode Island corporation, against the defendant, International Engraving Co., a New Jersey corporation. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. 1332(a)(1). Plaintiff's claim, in essence, stated that it had purchased a product (an embossing roll) from the defendant, and that the product failed (ruptured) while in operation, permitting a cooling fluid to escape from the roll which fluid ignited, causing a fire which resulted in substantial property damage (App. 16).\*

Plaintiff's complaint stated several counts including, *inter alia*, claims of negligence, strict liability and breach of warranty — its principal contention being that the plaintiff had ordered a "one-piece" embossing roll and that defendant had supplied a "two-piece" embossing roll without authorization from the plaintiff (breach of warranty). Plaintiff further claimed that the "two-piece" embossing roll which defendant delivered was defective (strict liability), and/or was negligently designed or manufactured (negligence). The case went to trial on the strict liability and negligence claims (App. 15-16).

At the first trial, the issue of liability was submitted to the jury on special questions pursuant to Rule 49(a), F.R.C.P. (App. 17, 24-30). The questions dealt separately with the issues of strict liability and negligence. After deliberation, the jury returned its answers to the special questions. On the issue of strict liability, the jury found clearly and unequivocally for the defendant (See questions 2-10, App. 24-27). On the issue of negligence, the jury returned answers which the defendant claimed, and the court believed, were inconsistent, ambiguous

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\* References throughout this brief to the Appendix refer to the Petitioner's Appendix.

and insufficient to support a verdict (App. 17). The court *sua sponte* decided to ask the jury additional special questions to resolve the inconsistency and ambiguity (App. 1). At the request of defendant, the court added one additional question submitted by defendant.

In its answers to the additional questions, the jury made a finding that "the plaintiff modified the roll by changing the journals . . ." (App. 32). Because the matter could not be immediately resolved, the court, with the agreement of the parties, dismissed the jury and requested that the parties file memoranda supporting their respective positions (App. 2).

After receiving memoranda from the parties, the court found that the answers to the special questions *on the negligence issue* were fatally inconsistent and ordered a new trial (App. 2-3). Upon motion of defendant, the court limited its new trial order to the issue of negligence (App. 21).

Plaintiff subsequently sought certification for an interlocutory appeal which the district court denied. Plaintiff thereafter filed a notice of appeal to the First Circuit Court of Appeals from the order of the district court ordering a new trial which was dismissed by the First Circuit on jurisdictional grounds (Order, August 21, 1974, Misc. No. 74-8066, App. 12-13).

The second trial commenced on October 17, 1974. The evidence elicited in the second trial (which was limited to the issue of negligence) was essentially the same as that elicited in the first trial. At the close of the evidence, defendant moved for a directed verdict on the basis that uncontroverted evidence showed that the journals had been replaced after delivery. The court reversed decision on defendant's motion. The second trial went to the jury on a general verdict. After deliberation, the jury returned a verdict for the defendant (App. 14).

### Argument.

#### I. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CLEARLY CORRECT, THERE IS NO CONFLICT OF DECISION AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The issue in this case may properly be stated as whether the plaintiff herein was deprived of its right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. Although plaintiff has attempted to obfuscate the real issue by attacking certain language in the circuit court's opinion, and by stating questions which need no answer, the fact remains that the procedure followed by the district court herein was consistent with the guarantee of the Seventh Amendment and with previous decisions of this Court. To understand properly the real issue, it is necessary briefly to outline what happened in the district court.

The issues of the first trial were submitted to the jury by special questions pursuant to Rule 49(a), F.R.C.P. (App. 17, 24-30). The questions dealt separately with the issues of strict liability and negligence. The jury returned its answers to the original set of questions in a manner that clearly found for the defendant on the issue of strict liability (App. 17). However, the jury's answers to the questions dealing with design negligence and manufacturing negligence were at least ambiguous if not inconsistent (App. 1).

Faced with the possibility of inconsistent answers to the negligence questions, the district court was justifiably concerned about the true intent of the jury. Cf. *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967). In order to clarify the true intent of the jury and to avoid the necessity of a new trial, the district court submitted additional questions to the jury

dealing only with the issues and answers that appeared to be inconsistent.<sup>1</sup> The jury returned its answers to the additional questions together with an "explanatory" note (App. 31-33). The additional answers and the "explanatory" note clearly showed that the jury was hopelessly confused on the negligence issue. After receiving memoranda from the parties, the district court ruled that the jury's responses on the negligence issue were fatally inconsistent and ordered a new trial limited to the issue of negligence (App. 2, 18).

It is important to point out that plaintiff does not attack the district court's ruling which held that the jury's responses to *all* the questions were fatally inconsistent on the negligence issue. Rather, plaintiff contends that the district court had no right to ask the additional questions and, therefore, it was the obligation of the Court of Appeals to ignore the additional answers and the explanatory note, to reconcile the answers to the first set of questions and to enter judgment for plaintiff.

Clearly, the district court did not violate the guarantee of the Seventh Amendment or any decision of this Court when it requested the *jury* to give answers to additional questions. Had the district court immediately declared a mistrial after the initial responses were given, plaintiff might argue that the principles announced in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), and *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963), had been violated. But here the district court simply asked the *jury* to give additional responses. Surely, plaintiff cannot argue that the district court was incorrect in letting the jury decide the issues or that the procedure violated the Seventh Amendment.

<sup>1</sup> The jury had not been discharged and was readily available to answer additional questions. Before submitting the additional questions, the district court took great pains to let the jury know that he was not criticizing its initial answers (App. 18, n. 4).



The procedure followed by the district court is consistent with the Seventh Amendment and previous decisions of this court. In *Gallick v. Baltimore & Ohio R.R. Co.*, *supra*, at 119, this Court held:

"We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360; *McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (C.A. 5th Cir.); *Morris v. Pennsylvania R.R. Co.*, 187 F. 2d 837 (C.A. 2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial."

This Court cited at 119 *McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (5th Cir. 1961), as an example of what the courts should do in order to avoid a mistrial. In *McVey* the district court, after receiving the jury's initial responses which it deemed inadequate, resubmitted the questions with additional instructions. The jury returned its further answers with an "explanatory" note. The district court not only considered the additional answers, but took into consideration the explanatory note in rendering a verdict. *McVey, supra*, at 55 ff. It certainly is consistent with the holdings in *Gallick* and *McVey* to conclude that the district court has the right, indeed the duty, to submit additional questions to clarify an ambiguity, cure an insufficiency or resolve an inconsistency. The only difference between this case and *McVey* is that the further answers herein demonstrated that the jury was hopelessly confused and "... confirmed the view that the initial responses were fatally inconsistent ..." (District Court Opinion, App. 8).

This is not a case where the district court was asking additional questions to create an inconsistency or to change the

jury's verdict. The context of the additional questions clearly demonstrates that the court was attempting to resolve and clarify the answers to the original questions. (See App. 31-33.)<sup>1</sup>

Moreover, as the Court of Appeals properly held, the district court was not required to enter judgment for plaintiff even if the original answers were reconcilable. If the answers were insufficient to support a verdict or for some other reason were inadequate, the district court has the discretion to enter judgment notwithstanding the verdict or to order a new trial. Rules 50 and 59, F.R.C.P.; see, e.g., *Iacurci v. Lummus, supra*. After a review of the initial answers, the Court of Appeals held that the district court did not abuse its discretion in concluding that the initial answers did not support a verdict for plaintiff and, therefore, a new trial was necessary.

Thus, plaintiff cannot argue that it was deprived of its Seventh Amendment guarantee of a trial by jury. When the first answers were returned in an ambiguous and insufficient state, the district court asked the jury to clarify and resolve the answers rather than declaring a new trial. *Gallick v. Baltimore & Ohio R.R. Co.*, *supra*. When the further answers, which demonstrated that the jury was hopelessly confused, were returned, the district court ordered a new trial. Since plaintiff does not contend that it was entitled to judgment on all of the answers its Seventh Amendment argument is clearly without merit. To the contrary, the district court gave the plaintiff the full benefit of the jury's complete consideration and decision. It was only because the jury was

<sup>1</sup> Had the district court submitted additional questions that were totally unnecessary and which were asked in order to create an inconsistency, this Court could reverse, declaring that the district court abused its discretion. However, since that is not the case here, plaintiff's argument is reduced to a claim that its Seventh Amendment right to trial by jury was denied because the jury was asked additional questions.

hopelessly confused and its answers were inconsistent that a new trial was necessary. After a second trial a jury returned a general verdict for the defendant.

It is abundantly clear that this case presents no cognizable constitutional issue nor does the decision below conflict with any decision of this Court or any other circuit court. The procedure followed by the district court utilized to the fullest extent the fact-finding function of the jury and cannot be attacked as violating the Seventh Amendment.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE  
INDEPENDENT BASES FOR AFFIRMING  
THE JUDGMENT BELOW.

In addition to the arguments advanced above, this Court should not grant certiorari because there are independent bases for affirming the judgment below. *Langnes v. Green*, 282 U.S. 531, 535-539 (1931). As the Court of Appeals noted:

"At the first trial . . . [d]efendant offered evidence (which was not conceded but was not contradicted by plaintiff) that the journals on the roll at the time of the accident were longer than the journals on the roll at the time it was delivered to plaintiff by defendant, and therefore must have been replaced by plaintiff or someone on its behalf. Such a replacement would have necessitated the destruction of the original shrink fit and weld, relieving defendant of any liability. . . ." (App. 16-17.)

"Finally, although not necessary for decision, we observe that plaintiff at no time introduced any evidence that the journals were the same journals it received from defendant. There was evidence that the serial number on the damaged head identified that head as having been

supplied by defendant. There was no evidence, however, that the original journal had remained in place — not even testimony that no change had been made. In contrast, defendant introduced uncontradicted evidence that it manufactured the roll (including the journals) in accordance with its blueprints, that the journals on the damaged rolls were not the journals it supplied, that journals can be, and often are replaced, and that to replace a journal, the original shrink fit and weld must be destroyed." (App. 22.)

Throughout these proceedings, defendant has maintained that it cannot be held liable for negligence since the journals on the original roll had been replaced. Defendant introduced uncontradicted and unrebutted evidence which demonstrated these facts and which absolved it of all liability.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,  
RALPH J. GONNELLA,  
HODOSH, SPINELLA, HODOSH  
& ANGELONE,  
808 Union Trust Building,  
Providence, Rhode Island 02903.

Of Counsel:

THOMAS C. ANGELONE,  
HODOSH, SPINELLA, HODOSH & ANGELONE,  
808 Union Trust Building,  
Providence, Rhode Island 02903.